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IN THE

Supreme Court of The United States

October Term, 1973

NO. 72-5830

CLOVER PATTERSON,

Appellant,

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Loudon District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR APPELLEE

CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia
PHILLIP D. GAUJOT
Assistant Attorney General
Counsel for Appellee
Room 26-E, State Capitol
Charleston, West Virginia 25305

OF COUNSEL:
CLETUS B. HANLEY
Deputy Attorney General
WILLIAM D. HIGHLAND
Special Assistant Attorney General
Room 26-E, State Capitol
Charleston, West Virginia 25305

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

For convenience, the parties shall be referred to as the appellant and appellee.

The opinion of the Court below, jurisdictional statement, constitutional provisions and statutes, questions presented for review, and statement of the case are

sufficiently stated in appellant's brief, and we perceive no reason to duplicate them herein.

SUMMARY OF ARGUMENT

Neither the United States Constitution nor the West Virginia Constitution provides that one shall have the right to have a case such as this decided by one learned in the law, and it cannot be said that, because one has the right to be represented by counsel in civil cases and the right to require representation in criminal cases, he shall also have the absolute right to be heard before one learned in the law. The justice of the peace should not and cannot be considered a system that is chronologically out of place in the judicial system. The justice of the peace still has an important role to play in local law enforcement even in these days of such profound changes in every way of life and especially keeping with today's emphasis on individual rights. Courts of the justices of the peace in West Virginia are generally presided over by laymen. Realizing the importance of appellate review from all courts in the judicial system, the framers of the West Virginia Constitution provided for such review of justice of the peace judgments. However, it cannot be said that this so-called right of appeal from a justice of the peace court is a review as a matter of right which could not be regulated by the Legislature. In fact, it is the exact opposite. The West Virginia Constitution dictates that the Legislature will prescribe regulations which are to be followed if one wishes to appeal a decision of a justice of the peace. Therefore, it cannot be said that there exists an absolute right to appeal from the court of a justice of the peace. By placing an appeal bond as a regulatory pre-

requisite to appeal does not take away the right to appeal but only regulates the appeal.

The State of West Virginia does have an interest in protecting monetary judgements, safeguarding its judicial system and offsetting its court expenses, and the appeal bond does bear a reasonable relationship to that interest.

I.

A HEARING BEFORE A JUSTICE OF THE PEACE IS APPROPRIATE TO THE NATURE OF THE CASE AND THEREFORE SATISFIES DUE PROCESS OF LAW.

Appellant points out on page 7 of his brief that the justice of the peace was *important* in local law enforcement in the formative years of this country when there were few people and fewer lawyers. Why should one believe that because there are more lawyers today there is no longer a need for the justice of the peace. It should not have to be pointed out that there are proportionally more people today and it remains very hard to find a lawyer to handle a case which generally falls within the jurisdiction of the justice of the peace court. It must also be pointed out that in many instances it is not economically feasible to retain an attorney to appear in a justice of the peace court. Why shouldn't there be a court with limited jurisdiction, such as the justice of the peace court, where one may go without the necessity of having an attorney appear for him.

Appellant on page 9 of his brief cites *NAACP* v. *Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); *Brotherhood of R.R. Trainmen* v. *Virginia ex*

rel. Virginia State Bar, 377 U.S. 1, 12 L. Ed. 2d 89, 84 S. Ct. 1113 (1964); *United Mine Workers* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967), and *Ward* v. *Winchester*, 11 Va. L. Reg. 501 (1902), for the proposition that there is a constitutional right of one involved in a civil matter to be represented and heard by an attorney at law and *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. ..... (1972), *Powell* v. *Alabama*, 287 U.S. 45, 77 L. Ed. 159, 53 S. Ct. 52 (1932), and the landmark case of *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), for the proposition that in criminal cases attorneys had to be provided to indigent defendants in misdemeanor and felony matters where loss of liberty was involved. The issue in the present case is not whether one has a constitutional right to be represented in civil and criminal matters but whether one has the right to appeal a judgment from a justice of the peace court without first paying the statutory bond pursuant to the West Virginia Constitution. In the first paragraph of appellant's argument reasons were pointed out why the justice of the peace system was instituted and those same reasons exist today. The justice of the peace courts were originally set up to handle the local legal problems and generally problems that were considered small in nature and in which lawyers were not necessary. Therefore, the right to be represented in civil matters and the right to require representation in criminal matters cannot be equated with the right to have a justice of the peace learned in the law. The appellant also contends that the justice of the peace system in West Virginia has educational deficiencies to such an extent that they prevent a fair and impartial trial. He contends that the

appellee, George Warner, as a layman and with no formal legal education, is unable to understand the legal arguments of appellant's counsel. In *State ex rel. Reece, et al.* v. *Gies, et al.*, ... W. Va. .....,—S.E.2d ..... (June 5, 1973), per Berry, Justice, at page 5, the West Virginia Supreme Court, in a case contesting the same statute which is presently being contested before this Court, citing *State ex rel. Moats* v. *Janco*, 154 W. Va. ....., 180 S. E. 2d 74 (1971), said that "this contention is without merit because of the constitutional provisions for such courts under the provisions of Article VIII of the Constitution of West Virginia." The same applies to the case at bar in that there is no merit in the contention of the appellant that the decision by the justice of the peace violates due process of law because the justice is without professional legal training. Article VIII, Section 1, of the West Virginia Constitution provides that:

> "The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in *justices of the peace.*" (Emphasis supplied.)

The office of the justice of the peace is established by Article VIII, Section 27,[1] of the West Virginia Constitution, which provides that the justice of the peace must reside in the district for which he was elected, and Article IV, Section 4,[2] requires that he must be a citizen entitled to vote. Article VIII, Section 28,[3] of the Constitution provides that:

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[1] West Virginia Constitution, Article VIII, § 27,
"Districting of County.
"Each county shall be laid off into districts, not less than three nor more than ten in number, and as nearly equal as may be in territory

> "* * * The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law."

The Constitution prescribes no further qualifications for the justice of the peace such as legal training and education or the status of a duly licensed attorney at law as contended by appellant. By Article VIII, the Supreme Court of Appeals, the circuit courts and their judges, and *justices of the peace* regardless of education, being created and provided for by the Constitution itself, are given the status of constitutional tribunals.

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and population. There shall be elected in each district containing a population not exceeding twelve hundred, one justice of the peace, and if the population exceeds that number, two such justices shall be elected therein. Every justice shall reside in the district for which he was elected and hold his office for the term of four years, unless sooner removed in the manner prescribed by law. The districts as they now exist shall remain till changed by the county court."

[2] West Virginia Constitution, Article IV, § 4,

"Persons Entitled to Hold Office—Age Requirements.

"No person, except citizens entitled to vote, shall be elected or appointed to any State, county or municipal office; but the governor and judges must have attained the age of thirty, and the attorney-general and senators the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the State for five years next preceding their election or appointment, or be citizens at the time this Constitution goes into operation."

[3] West Virginia Constitution, Article VIII, § 28,

"Jurisdiction of a Justice of the Peace.

"The civil jurisdiction of a justice of the peace shall extend to actions of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed three hundred dollars. The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law. And justices of the peace shall have authority to take the acknowledgment of deeds and other writings, administer oaths, and take and certify depositions. And the legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient, under such regulations and restrictions as may be prescribed by general law, except that in suits to recover money or damages, their jurisdiction and powers shall in no case exceed three hundred dollars. Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law."

Harbert v. *Harrison County Court*, 129 W. Va. 54, 39 S.E.2d 177 (1946).

Quoting *Moats*, the West Virginia Supreme Court in *Reece*, *supra*, at page 5, said that:

> " 'The Constitution prescribes no qualification for a justice of the peace except the requirement of Article VIII, Section 27, that he must reside in the district for which he was elected and the requirement of Article IV, Section 4, that he must be a citizen entitled to vote; and there are no additional qualifications prescribed for a justice of the peace such as legal training or the status of a duly licensed attorney at law as contended by the petitioner.
>
> * * *
>
> " 'In view of the foregoing this Court holds that a duly elected justice of the peace who resides in the district for which he was elected is authorized and empowered to exercise within the county in which such district is located the jurisdiction conferred upon him by the Constitution and the statutes of this State; and *his lack of professional legal training and his inability to attain the status of a duly licensed attorney at law do not of themselves render his judgment of conviction of a defendant of a criminal offense of which the justice has jurisdiction violative of the due process clauses of the Federal and State Constitutions.*' " (Emphasis supplied.)

Also in *Moats*, at page 78, the Court said that:

> "* * * Though no person may engage in the practice of law unless he is a duly licensed attorney at law, a justice of the peace, in the trial and

> disposition of a case of which he has jurisdiction, is not engaged in the practice of law but instead acts in a judicial capacity and is engaged in the discharge of a judicial function."

Even counsel for the appellant admits on page 8 of the brief of the appellant that "there are no qualifications prescribed for justices of the peace. *Neither* the *state constitution, state statutes nor the common law* set forth any eligibility requirement * * *." (Emphasis supplied.) The Constitution of West Virginia is the fundamental organic law of the State so far as it is consistent with the provisions of the Federal Constitution. It was made by the sovereign people of West Virginia and by them alone, and only the people of West Virginia should unmake that Constitution. Wisely or not, the people of West Virginia have set upon themselves a court of limited jurisdiction where a layjudge presides and so long as such provisions do not discriminate against any identifiable class they do not violate the equal protection clause.

II.

EQUAL PROTECTION DOES NOT INCLUDE ABSOLUTE AND UNRESTRAINED APPELLATE REVIEW OF AN INITIAL ADJUDICATION BEFORE A JUSTICE OF THE PEACE COURT WHICH AFFORDED DUE PROCESS.

Appellant contends on page 12 of his brief that "given the nature of the justice of the peace system his right to be heard includes the appellate process." Under *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, 55 A.L.R. 2d 1055 (1956), and *Lindsey* v. *Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972),

due process does not require, even in criminal cases, that a state provide an appellate system. Once it does provide such a system, however, a state may not, in criminal cases, deny review merely because of a defendant's inability to pay the costs of appeal. *Griffin, supra.* It is not clear how far these constitutional guarantees may operate to insure such a right in civil proceedings. In civil cases there is no general right to proceed in forma pauperis. A state may require the posting of security in a shareholder's derivative suit, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), and a state, by means of an appeal bond requirement,

> "[M]ay properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession * * *." *Lindsey* at 53.

United States v. *Kras*, ... U.S. ....., 34 L. Ed. 2d 626, 93 S. Ct. ..... (1973), and *Ortwein, et al.* v. *Schwab, et al.*, ... U.S. ....., 35 L. Ed. 2d 572, 93 S. Ct. ..... (1973), stand for the proposition that a state may place financial obstacles in the path of access to a court where those obstacles have a rational justification, see *Cohen* v. *Beneficial Industrial Loan Corp., supra*, and where no fundamental interest of the person seeking access is involved. In only one kind of civil case —a divorce proceeding—has the Supreme Court found such a fundamental interest. *Boddie* v. *Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). The state's control over marriage and divorce has been found to be in a different category from its control over bankruptcy, see *Kras, supra*, or welfare payments, see

Ortwein, supra. The instant case, like *Kras* and *Ortwein,* involves an interest of far less constitutional significance than the interest in dissolving a marriage. The case at bar involves, moreover, an interest—rights under a sales contract—which depends even less for its enforcement upon judicial machinery than the interests of the appellants in *Kras* and *Ortwein,* and cannot be considered fundamental. In adjudicating rights under a sales contract, a court is far from being the exclusive means of dispute settlement, see *Boddie, supra.*

The appellants in *Ortwein* had had a pretermination evidentiary hearing by an administrative agency, and the due process requirement of a meaningful opportunity to be heard was thus satisfied. See *Goldberg* v. *Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Appellate review of a judgment of a justice of the peace is made available by statute in West Virginia, and it is the bond provision of that statute that is under attack before this Court. As in *Ortwein,* appellant, Clover Patterson, was accorded a full trial on the merits of his case in the justice of the peace court. Having received a hearing before the justice of the peace, appellant had a full opportunity to present a defense and therefore fulfilled the promise of the Due Process Clause of the Fourteenth Amendment of having an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. *Armstrong* v. *Manzo,* 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965); *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Therefore, the appeal bond has a valid and rational justification, see *Cohen* v. *Beneficial Industrial Loan Corp.* and *Lindsey* v. *Normet, supra.*

In *Ortwein, et al.* v. *Schwab, et al., supra*, this Court indicated that there are instances where due process does not necessitate a trial in a court of record or that the case be "adjudicated by one learned in the law." In *Ortwein*, a recipient of Oregon old age assistance, whose assistance was reduced $39 per month by the county welfare agency in a decision upheld on appeal by the Oregon Public Welfare Division, and a welfare recipient who received smaller welfare payments by reason of a decision of the Oregon Public Welfare Division, petitioned the Supreme Court of Oregon for a writ of mandamus requiring the Oregon Court of Appeals to accept their cases appealing the division's decisions, without payment of the Oregon $25 appellate court filing fee, because they were indigents and unable to pay the fee. The Supreme Court of Oregon denied the petition and on appeal, this Court affirmed. In a per curiam opinion it was held that the filing fee requirement was not a denial of due process, because the petitioners received agency pretermination evidentiary hearings meeting due process requirements, and that it did not violate the Equal Protection Clause as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses. This Court also said that it did not violate the equal protection clause as arbitrary and capricious in allowing others to appeal in forma pauperis. In *Ortwein*, a case analogous to the case at bar, there was not a court of record present and one learned in the law did not preside over the hearing; however, this Honorable Court held that due process was satisfied.

This Court affirmed the decision of the Supreme Court of Oregon for the same reasons that it found persuasive in *United States* v. *Kras, supra*. In the *Kras*

case this Court held that an individual's interest in obtaining a discharge in bankruptcy did not rise to the same constitutional level as one's inability to dissolve his marriage except through the courts. In *United States* v. *Kras*, the appellee's petition for voluntary bankruptcy was accompanied by a motion for leave to proceed without payment of filing fees, which amounted to less than $50. The appellee claimed that the filing fee requirement was unconstitutional. The district court, relying upon *Boddie* v. *Connecticut*, *supra*, which held that state statutes requiring the payment of court costs and fees were unconstitutionally applied to prevent indigents from suing for divorce, held that, as applied to appellee, the requirement of prepayment of a filing fee in order to obtain a discharge in bankruptcy violated the Fifth Amendment right of due process, including equal protection. On appeal by the government, this Court reversed the district court and held that the appellee's interest in the elimination of his debt burden, and in obtaining his desired new start in life, did not rise to the same constitutional level as a married person's interest in dissolving a marriage, and that the decision in the *Boddie* case did not control the disposition in the *Kras* case.

In both *Ortwein* and *Kras*, the plaintiffs did not get into court because of a filing fee, whereas in the instant case the appelant did have a hearing before a court at a meaningful time and in a meaningful manner which was appropriate to the nature of his case.

Appellant makes reference to *Richmond* v. *Henderson*, 48 W. Va. 389, 37 S. E. 653 (1900), for the proposition that Article VIII, Section 28, of the West Virginia Constitution entitles him to an appeal as a matter

of right. Appellant is basically correct; however, the right does not exist until there has been a compliance with Chapter 50, Article 15, Section 2, of the Code of West Virginia. Both *Richmond* v. *Henderson* and *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, 19 S. Ct. 580 (1899), another case cited by appellant, are distinguishable because they were concerned with the proposition that a retrial of a justice of the peace judgment did not violate the United States and West Virginia constitutional clauses prohibiting retrial. In *Richmond* v. *Henderson*, at page 405, the Court decided that:

> "* * * [I]n any civil action tried before a justice by a jury there may be the like appeal as in other cases, without any bill of exceptions or certificate of evidence, without any manifestation of error of law on the record, simply an appeal as of right, without any assignment of error or showing of error, which appeal of its own force nullifies the verdict and judgment and opens the case for trial *de novo* upon both law and fact in the circuit court, just as in cases tried by the justice without a jury."

There is nothing in the opinions of either case indicating that there is an absolute right to a trial de novo in the circuit courts without first complying with the regulatory manner of exercising the appeal. Appellant is obviously confused thinking that the right to appeal is a fundamental part of the judicial process and, therefore, no regulations at all may be placed by the Legislature on an appeal from a justice of the peace court. In fact, Article VIII, Section 28, the constitutional section relied on by the appellant for the proposition that an absolute right to appeal from the decision of a justice of the peace is, in actuality, the removal and

transfer of the controversy to a court of record for trial de novo, also states that "Appeals shall be allowed from judgments of justices of the peace in such manner as may be *prescribed by law*" (emphasis supplied), indicating that the drafters of the Constitution deliberately inserted the above sentence with the intention that there should be some form of regulating the manner of exercising the appeal. In *Home Sewing Mach. Co.* v. *Floding*, 27 W. Va. 540 (1886), the West Virginia Supreme Court said that where a party, against whom a judgment has been rendered by a justice of the peace, desires to appeal therefrom, he is entitled to such appeal as a matter of right, *if* he files with the justice of the peace the appeal bond. It appears that the Court meant that unless the party seeking the appeal complies with the statute, his right to appeal is no longer absolute, but becomes conditional, and to entitle him to the benefit of Chapter 50, Article 15, he must bring himself within its provisions by making his application for an appeal accompanied with the proper bond.

Appellee agrees with appellant that the appeal operates so as to vacate the judgment in the inferior tribunal and renders it ineffectual as the foundation of an action. However, there must be first the filing of the bond which perfects the appeal and vacates the judgment of the justice of the peace. *Cook* v. *Continental Casualty Co.*, 82 W. Va. 250, 95 S. E. 835 (1918).

Appellant contends that a cash bond or a commercial surety "cause[s] appellant to lose the beneficial use of his property pending a hearing before a learned and unbiased judge." (See brief of appellant, page 19.) Citing *Brooks* v. *Small Claims Court*, 105 Cal. Rptr. 785, 789, ... P. 2d ....., 41 U.S.L.W. 2391 (1973),

appellant contends that the "loss of funds, the premium, in order to obtain the fair tribunal" was "taking of property without due process of law under the *Sniadach* rationale." (See brief of appellant, page 19.) However, appellee wishes to point out that the courts have consistently applied the rationale of *Sniadach* to strike down *summary* procedures that deprive persons of their property pending a hearing. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969). The *Brooks* case is distinguishable from the case at bar in that there was a statutory restriction on appearance by an attorney in the small claims court. There, the court ruled that an undertaking in connection with an appeal from a judgment entered in a small claims court constituted a taking of property prior to a due process hearing with the right to counsel. The first opportunity for representation by counsel arose at the trial de novo after appeal. But the appeal was conditioned on the filing of a surety bond in lieu thereof. In the case at bar, due process, as stated earlier by the appellee, was satisfied in that there was an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case, and a hearing in which appellant had the right to be represented by counsel if he so desired.

Appellant rightfully contends that "The function of the appeal bond in the West Virginia Justice of the Peace System is to provide '* * * security which the statute substitutes in place of the *advantage* which the plaintiff gains by the judgment. * * *'" (Emphasis supplied.) (See brief of appellant, page 19.) Further citing *Chewning* v. *Tomlinson*, 105 W. Va. 76, 78, 141 S. E. 532 (1928), counsel for appellate said that "It is

because of this security that the judgment is vacated." In that statement, appellant recognizes the "advantage" which plaintiff gains. However, on page 20 of the brief of appellant, counsel for appellant contradicts himself by saying that "plaintiff has no proprietary right in his judgment." Again counsel for the appellant cites *Richmond* v. *Henderson*, distinguished earlier, for the proposition that the appellant has an absolute right to appeal without the necessity of providing an appeal bond. In *Richmond*, the Court said that the appeal lies from the judgment of the justice of the peace rendered upon a verdict of a jury as in cases tried by him without a jury. It was the retrial on appeal that was questioned in that case as well as the *Capital Traction Co.* v. *Hof, supra*, case. In both *Richmond* and *Hof*, the issue was why a retrial on appeal did not violate the clauses prohibiting retrial.[4]

Under its general authority to regulate appellate procedure, the Legislature has the power to require the giving of a bond as a condition precedent to the right to appeal, unless such power is clearly excluded by the Constitution and such statutes do not violate constitutional provisions granting the right to appeal, as they do not restrict or deny the right, but merely regulate

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[4] West Virginia Constitution, Article III, § 13,

"Right of Jury Trial.

"In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law.

United States Constitution, Seventh Amendment

"*Trial by Jury in Civil Cases.*

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

the manner of exercising it. *Horn* v. *Blackwell*, 212 S. C. 480, 48 S.E.2d 322, 323 (1948).

It is reasonable to assume that, in considering the competing interests involved, namely, Graham Motor Company's right to judgment and Clover Patterson's right under a statute to appeal from an adverse judgment, the Legislature deliberately inserted the bond provisions with the intention of equalizing the inequities by specifically and unequivocally granting the protection to the plaintiff, Graham Motor Company, who was awarded a judgment in the justice of the peace action.

The requirement of an appeal bond is for the benefit of the appellee, its purpose being to secure the appellee against loss when there is no merit in the appeal, or the appeal is not prosecuted with effect. Public policy requires appellant to furnish appellee security against loss through unnecessary and unsuccessful appeals. *Bryan* v. *Luhning*, 106 S.W.2d 403 (Tex. Civ. App. 1937). It is not intended, however, as an additional security for the original indebtedness of the appellant. but as an indemnity to the appellee against further trouble, expense, and costs while the case is undergoing a review to ascertain whether or not error was committed or injustice done the appellant by the decree of the court below. *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U.S. 37, 99 L. Ed. 46, 75 S. Ct. 92 (1954).

The appeal bond is in no sense a substitute for the judgment appealed from; in fact, its vitality depends on the survival of the judgment, and its fate is inseparably linked with it. If the judgment is reversed, the

obligation of the appeal bond becomes void; if the judgment is affirmed, the obligation remains in full force and effect. *Rockwell* v. *District Court of Lake County*, 29 P. 454, 17 Colo. 118 (1891).

In *Reece* v. *Gies, et al., supra*, a case contesting the constitutionality of the same statute that is currently being attacked in the instant case, the West Virginia Supreme Court said that the requirements contained in Chapter 50, Article 15, Section 2, of the West Virginia Code, for giving of a bond in an amount double the amount of the judgment, bore a reasonable relation to the amount that may be subject to be recovered under the bond if the plaintiff prevailed on appeal and did not violate the due process or equal protection clauses of the Federal and West Virginia Constitution.

The arguments used by appellant in the instant case were also used in the *Reece* case. However, the Court did not agree with the arguments that there exists in West Virginia an absolute right to appeal in the justice of the peace system or that the appeal bond bars access to the courts, thus depriving appellant of any of his fundamental interests guaranteed by the due process and equal protection clauses.

The facts in the *Reece* case were very similar to the case at bar with the exception that it dealt with an unlawful detainer action. In the *Reece* case, at page 7 of the Court's opinion, the Court said that:

> "The double bond in the case at bar could never be more than $600 because the limit of the jurisdiction in a civil action before a justice of the peace is $300. If the appellant does not prevail the bond merely covers the judgment,

> interest and costs. The bond for the amount of the year's rent is to cover accrued rent while the tenant remains in the landlord's premises during the pendency of the appeal, and only the actual damages and cost, and actual rent owed during that time could be recovered under the bond. Both bond requirements bear a reasonable relation to the amount subject to be recovered under the bond. If the tenant were allowed to remain in the premises without paying rent or giving a bond to secure the payment of the damages and rent during the pendency of the appeal, a tenant could remain in the premises rent free during an appeal which could last, in some cases, for more than a year and result in the landlord being deprived of his property without due process of law."

Appellee contends that the West Virginia Court of Appeals was the proper court to interpret the State Constitution and the statutory provision now under attack in the present case, and that it correctly held that the appeal bond did not violate the due process or equal protection clauses of the Federal and West Virginia Constitutions.

III.

THE STATE APPEAL BOND REQUIREMENT IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

The bond requirement imposed by Chapter 50, Article 15, Section 2, of the West Virginia Code, on appellants from justice of the peace courts is reasonable and relevant to the State's interest and therefore is constitutionally valid and does not violate the Equal Protection Clause of the Fourteenth Amendment to the

United States Constitution. The appeal bond is conditioned for the satisfaction of the judgment in full, together with all costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. *Omaha Hotel Co., et al.* v. *Kountze, et al.*, 107 U. S. 378, 381, 27 L. Ed. 609, 611, 2 S. Ct. 911 (1883).

In *National Union of Marine Cooks and Stewards* v. *Arnold, supra*, at page 38, this Court held that neither the Due Process nor the Equal Protection Clause of the Fourteenth Amendment was violated when the State of Washington's Appellate Court dismissed "an appeal from a money judgment" since the dismissal was a reasonable measure for safeguarding the collectibility of that judgment. At page 43 of the opinion, this Court said that "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process." *District of Columbia* v. *Clawans*, 300 U. S. 617, 627, 81 L. Ed. 843, 847, 57 S. Ct. 660 (1937); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, 80, 74 L. Ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460 (1930); *Reetz* v. *Michigan*, 188 U. S. 505, 508, 47 L. Ed. 563, 566, 23 S. Ct. 390 (1903); *McKane* v. *Durston*, 153 U. S. 684, 687, 688, 38 L. Ed. 867, 868, 14 S. Ct. 913 (1894).

In *National Union*, pending defendant's appeal to a state appellate court from a money judgment, the trial court ordered the defendant to deliver certain bonds to the court's receiver for safekeeping pending disposition of the appeal. Upon defendant's failure to deliver the

bonds, the trial court adjudged it in contempt, and the appellate court dismissed the appeal, after allowing defendant fifteen days within which to purge itself of contempt. At page 45 of the opinion, this Court said that:

> "The supplemental proceeding indicated that the $298,000 in bonds, to which the court directed its order, constituted the only substantial asset from which payment of respondents' judgment might be realized and that this asset might be dissipated unless placed in protective custody.
>
> "In appraising the reasonableness of the State's order, it is noteworthy that the court did not seek to apply the bonds to the satisfaction of respondents' judgment. It merely directed petitioner to deliver them to the court's receiver for safekeeping. *Petitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it. It was dismissed because of petitioner's failure to comply with the court's order to safeguard petitioner's assets from dissipation pending such appeal.*
>
> "Viewing the dismissal of petitioner's appeal in the light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing a supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law." (Emphasis supplied.)

Here we are speaking of reasonable procedural provisions to safeguard a monetary award for an appellee who is rightfully entitled to it because of a lower court judgment. Therefore, Chapter 50, Article 15, Section 2, imposes a requirement which bears a clear and reas-

onable relationship to a valid State objective and which does not in any way discriminate.

Appellant contends that the West Virginia appeal bond requirement creates a second classification of persons who wish to appeal judgments from justice of the peace courts. Appellant contends that he was precluded from appealing the judgment because he was financially unable to post the required $600, and further that an individual in a position identical to the appellant, but with some financial means, could have posted the requisite bond. (See brief of appellant, page 25.) It should be remembered that the fact of poverty or inability to procure securities does not of itself relieve an appellant from the necessity of giving an appeal bond or other security unless so provided by statute. *Going's Administratrix* v. *Norfolk & Western Railway Co.*, 119 Va. 543, 89 S. E. 914, *aff'd*, 248 U. S. 538, 63 L. Ed. 409, 39 S. Ct. 22 (1918).

Appellant makes the contrast, "to appeal from [an adverse decision in] a court of record a party need only post an appeal bond 'in a penalty to be fixed by the court or judge.'" Appellant continues that "As a practical matter the [amount of the] appeal bond * * * is generally set at the amount of the judgment." (See brief of appellant, page 25.) It is reasonable to assume that the appellant in the present case considers an appeal bond in the amount of the judgment to be satisfactory, but one which doubles the amount of the judgment as invidious and discriminatory. However, the same issues could be raised concerning an appeal bond in the amount of the judgment. There would continue to be situations where the appellant would be required to raise an appeal bond equal in amount to the judgment.

There would remain the possibility that there are some who could not file the appeal bond because of their financial situations.

In *Omaha Hotel Company, et al.* v. *Kountze, et al., supra,* this Court set out the history of the appeal bond. At page 611 of the opinion, Justice Bradley, in showing a precedent for a Nebraska appeal bond, said that:

> "These enactments are substantially a reproduction of like clauses in the Judiciary Act of 1789 [1 Stat. at L., 73], as regards writs of error, and of the Act of 1803 [2 Stat. at L., 244], as regards appeals. The material words are the clause in the bond which declares '*That the plaintiff in error (or appellant) shall prosecute his writ to effect, and if he fail to make his plea good, he shall answer all damages and costs.*'
> • • •
>
> "By the common law a writ of error, without any security, was of itself a *supersedeas* of execution from the time of its allowance or recognition by the court to which it was directed; and even before, if the defendant in error had notice of it; or, in the common pleas, from the time of its delivery to the clerk of the errors of that court, whose business it was, amongst other things, to prepare the returns. 1 Tidd, Pr., 530, 1145; Impey, Pr., C. P. 16; Petersd. Abr., tit. Error, I. (H, *a.*) The presentation of the writ issuing from the Superior Court, stopped all further proceedings except such as were incidental to a compliance with its command to certify the record. But as writs of error came to be sued out for the purpose of delay, various Acts of Parliament were passed, requiring security in certain cases, in order that the writ might operate as a *supersedeas.* First, without re-

> ferring to a statute in the time of Elizabeth, the Statute of 3 James I., ch. 8, declared that no execution should be stayed or delayed, upon or by any writ of error, or *supersedeas* thereon, for the reversing of any judgment in debt upon a single bond, or a bond with condition for the payment of money only, or in debt for rent, or upon any contract, unless the plaintiff in error with two sufficient sureties, should first be bound to the plaintiff in the judgment, 'By recognizance, in double the sum recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error *non-prossed*, all and singular the debts, damages and costs, adjudged upon the former judgment; and all costs and damages to be awarded for the delaying of execution.' "

Petitioners rely on *Lindsey* v. *Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972), to show that the bond requirement imposed by the justice of the peace in accordance with Chapter 50, Article 15, Section 2, of the West Virginia Code cannot be reasonably related to a valid State interest. In the *Lindsey* case this Court held that the Oregon statute, requiring a tenant to post bond on an appeal from an adverse decision in an amount twice the rent expected to accrue pending the appellate decision and providing that if the landlord prevailed the landlord was entitled to collect the entire amount of the bond, was a denial of equal protection of the law because there was no reasonable relationship between the bond requirement and the actual rent accrued and damages sustained by the landlord. In that case the Court said at page 77 that:

> "* * * *While a State may properly take steps to insure that an appellant post adequate security*

before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. * * *" (Emphasis supplied.)

The bond requirement in the case at bar could never be more than $600 because the limit of the jurisdiction in a civil action before a justice of the peace is $300. If the appellant does not prevail, the bond merely covers the judgment, interest and costs. In the recent case of *Greer* v. *Dillard*, ___ Va. ___, 193 S.E.2d 668 (1973), the Supreme Court of Appeals of Virginia held that an indigent was required to post a $600 bond in order to appeal a case from a court not of record to a court of record, and the right to appeal was contingent upon satisfying the statutory requirements in connection therewith. Although an indigent against whom a money judgment had been entered was permitted to appeal without payment of the costs or fees in accordance with Virginia Code, Section 14.1-183, this statutory provision could not be construed as relieving an appellant from posting an appeal bond to cover the cost of the judgment entered against him. The Virginia court said that a bond, such as we have in the instant case, is not a fee or a cost and that, had the legislature intended to include appeal bonds in the in forma pauperis statute, it would have done so. The court said that its failure to do so could not be treated as an inadvertent omission to be supplied by judicial construction.

At page 670 of the opinion, the Court said that:

> "We cannot because we will not usurp the General Assembly's prerogative to write the laws and fix public policy. As a matter of public policy, it is one thing for the state to excuse indigents from payment of fees and costs which are essentially state interests; it is another thing for the state to excuse indigents from posting bonds designed to protect the judgment rights of successful litigants."

CONCLUSION

We conclude that so long as Chapter 50, Article 15, Section 2, of the Code of West Virginia does not discriminate against or authorize discrimination against any indentifiable class, it does not violate the equal protection or due process clauses.

Therefore, for the foregoing reasons and authorities cited herein, it is respectfully submitted that this Honorable Court affirm the decision of the District Court upholding the constitutionality of West Virginia's statute for an appeal bond.

Respectfully submitted,

CHAUNCEY H. BROWNING, JR.
Attorney General of
West Virginia

PHILLIP D. GAUJOT
Assistant Attorney General
Counsel for Appellee

OF COUNSEL:

CLETUS B. HANLEY
Deputy Attorney General

WILLIAM D. HIGHLAND
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Phillip D. Gaujot, counsel for appellee, do hereby certify that a true copy of the foregoing Brief for Appellee was served upon George R. Higinbotham and Paul J. Kaufman, counsel for appellant, by mail, by depositing said copy in the United States Postal Service mail, with first-class postage prepaid, on the 13th day of July, 1973, addressed as follows:

TO: George R. Higinbotham, Esq.
Paul J. Kaufman, Esq.
Attorneys at Law
1116-B Kanawha Boulevard, E.
Charleston, West Virginia 25301

Phillip D. Gaujot